88-560

No. _____

Supreme Court, U.S.
FILED
SEP 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

Theresa F. Mitan, Appellant

v.

Frank J. Mitan

On Appeal From The Michigan Supreme Court

JURISDICTIONAL STATEMENT

Appellant, Pro Se:
Theresa F. Mitan
30943 Club House Lane
Farmington Hills, MI 48018

September, 1988

38 pp

QUESTION PRESENTED

The ultimate question presented is whether the courts of the State of Michigan acting pursuant to Section 552 of the Michigan Compiled Laws Annotated may deprive a party of her rights under the U.S. Bankruptcy Code and the Fourteenth Amendment to the United States Constitution.

This ultimate question involves, among others, the following subsidiary questions:

1. Do prior holdings of this Court prohibit the courts of the State of Michigan acting pursuant to Chapter 552 of the Michigan Compiled Laws Annotated from making determinations of core bankruptcy proceedings specified in 28 U.S.C. Section

157(b)(2)(B) and 28 U.S.C. 157(b)(2)(I) without consideration of Title 11 of the United States Code?

2. Do 11 U.S.C. Section 727(b) and 11 U.S.C. Section 1141(d) prohibit the courts of the State of Michigan acting pursuant to Chapter 552 of the Michigan Compiled Laws Annotated from creating a class of non-dischargeable debts not within the legislative exceptions to discharge expressed in 11 U.S.C. Section 523?

3. Does 11 U.S.C. Section 522(c) prohibit the courts of the State of Michigan acting pursuant to Chapter 552 of Michigan Compiled Laws Annotated from authorizing a creditor's execution upon property based upon an unsecured debt that arose before the filing of the

bankruptcy petition, even if the debt has been declared not discharged on grounds other than 11 U.S.C. Section 523(a)(1) or 11 U.S.C. Section 523(a)(5), if the property has been exempted under 11 U.S.C. Section 522(d)(10)(D), specifically in light of 11 U.S.C. Section 522(e)?

4. Does the Fourteenth Amendment to the United States Constitution prohibit the courts of the State of Michigan acting pursuant to Chapter 552 of the Michigan Compiled Laws Annotated from binding a party to a judgment which it entered in compliance with an alleged settlement, without providing that party with an opportunity for a hearing in which she could present evidence that she did not agree to the alleged settlement, especially if that party did not, in

fact, agree to the alleged settlement.

All of the parties appearing in the Michigan Supreme Court are listed in the caption.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. _____

Theresa F. Mitan, Appellant

v.

Frank J. Mitan

On Appeal From The Michigan Supreme Court

JURISDICTIONAL STATEMENT

Appellant appeals from the final order of the Michigan Supreme Court, entered June 28, 1988, denying Appellant's Application For Leave To Appeal, effectively affirming the Judgment of the Circuit Court for the County of Oakland, State of Michigan.

OPINIONS BELOW

The December 10, 1987 opinion of the Michigan Court of Appeals (App. B, B1 - B-9) was not officially reported. The Supreme Court of Michigan issued no opinion.

JURISDICTION

This is an appeal from a final order of the Michigan Supreme Court (App. A, A-1 - A-3).

On November 20, 1985, over the objections of Appellant, the Circuit Court for the County of Oakland, State of Michigan, entered a Judgment Of Absolute Divorce (App. C, C-1 - C-3). The entry of the Judgment Of Absolute Divorce was based upon an earlier settlement by the parties. Appellant objected because the terms of the Judgment Of Absolute Divorce, as entered, differed from the terms of the earlier settlement. The court did not hold an evidentiary hearing or make any findings of fact.

One of the changes allowed Appellee to collect on an indemnity obligation from Appellant in the event that Appellant filed voluntary bankruptcy, by a set-off against Appellee's alimony obligation to Appellant.

On December 5, 1985, Appellant filed a "Motion To Reconsider Order Entering Judgment Of Absolute Divorce And To Amend Judgment Of Absolute Divorce" in the Circuit Court of the County of Oakland, (App. I, I-1 - I-9) contesting the validity of the alimony set-off provision and the other changes.

On January 8, 1986, the Circuit Court of the County of Oakland entered an "Order Denying Motion To Reconsider Order Entering Judgment Of Absolute

Divorce And To Amend Judgment Of Absolute Divorce" (App. D, D-1 - D-3) denying Appellant's motion.

On January 8, 1986, Appellant filed a Claim of Appeal with the Michigan Court of Appeals (App. F, F-1 - F-3), contending that the alimony set-off provision deprived Appellant of her rights under the United States Bankruptcy Code and that the changes made were invalid because Appellant had not agreed to them and had not been given an evidentiary hearing.

On December 10, 1987, the Michigan Court of Appeals issued an opinion affirming the Judgment Of Absolute Divorce entered by the Circuit Court for the County of Oakland (App. B, B-1 - B-9).

On January 4, 1988, Appellant filed an Application For Leave To Appeal with the Michigan Supreme Court (App. E, E-1 - E-13), again contending that the alimony set-off provision deprived Appellant of her rights under the United States Bankruptcy Code and that changes made were invalid because Appellant had not agreed to them and had not been given an evidentiary hearing.

On June 28, 1988, the Supreme Court of Michigan entered an Order denying Appellant's Application For Leave To Appeal (App. A, A-1 - A-3).

This court has jurisdiction of this appeal by virtue of U.S. 28 U.S.C. Section 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV to the United States Constitution, Sections 522(c), 522(d)(10)(D), 522(e), 523, 727(b), and 1141(d) of Title 11 of the United States Code, and Section 157(b)(2)(B), 157(b)(2)(I), and 1334(b) of Title 28 of U.S. Code are set forth in Appendix J, J-1 to J-26.

STATEMENT

This is a divorce action involving a marriage of over 33 years. On June 11, 1985, the parties placed an oral settlement on the record. Both parties stated on the record that they agreed to the settlement, that they thought it was fair, and that they would be bound by it.

Subsequently, Appellee refused to agree to a written judgment incorporating the settlement of June 11, 1985, and claimed there were remaining issues to be resolved. The parties stipulated in writing that the "remaining issues" would be resolved by binding mediation.

Unfortunately, the mediator not only resolved the remaining issues, but

also made changes to the June 11, 1985 settlement.

On November 20, 1985, The Circuit Court for the County of Oakland, State of Michigan, pursuant to Chapter 552 of the Michigan Compiled Laws Annotated, entered a Judgment of Absolute Divorce (App. C, C-1 - C-43) over the objections of Appellant. Appellant objected that the terms of the judgment did not comply with the terms of the settlement earlier reached by the parties, because of changes made by the mediator which Appellant had not agreed to. Nevertheless, the court entered the judgment without taking any testimony whatsoever, without reviewing the mediation transcipt, and without making any findings of fact that the judgment had been agreed to by both

parties.

On December 5, 1985, Appellant filed a "Motion To Reconsider Order Entering Judgment of Absolute Divorce and To Amend Judgment Of Absolute Divorce" (App. I, I-1 - I-9) specifying the changes made to the Judgment of Absolute Divorce and the reasons Appellant would not agree to them.

The second sentence of Paragraph 10 of the Judgment of Absolute Divorce states as follows: "In the event that plaintiff shall declare voluntary bankruptcy so that her obligation hereunder shall be eliminated or diminished then, in said event, the defendant shall have a right to set-off against his obligation to pay alimony the amount of said deficiency

plaintiff." (App. C, at C-9). Paragraph 15 of Appellant's "Motion To Reconsider Order Entering Judgment Of Absolute Divorce And To Amend Judgment Of Absolute Divorce" objected to the second sentence of Paragraph 10 of the Judgment of Absolute Divorce on the ground that it would deprive Appellant of her rights under federal Bankruptcy law (App. I, at I-7).

On January 8, 1986, the Oakland County Circuit Court issued an "Order Denying Motion To Reconsider Order Entering Judgment Of Absolute Divorce And To Amend Judgment Of Absolute Divorce" (App. D, D-1 - D-3). The trial court again did so without taking any testimony whatsoever, without reviewing the mediation transcript, and without making any

findings of fact that the judgment had been agreed to by both parties.

On January 8, 1986, Appellant filed a Claim of Appeal with the Michigan Court Of Appeals (App. F, F-1 - F-3).

In the Statement of Questions Involved in the Brief of Appellant-Plaintiff Theresa F. Mitan in the Michigan Court Of Appeals (App. H, H-1 - H-2), Appellant specifically raised Question IV: "May A State Court Judge In A Divorce Proceeding Deprive A Party Of Her Rights Under The Bankruptcy Code of 1978?" (App. H, at H-2). In that same Brief, Appellant claimed that she had a right to, and had been deprived of, an evidentiary hearing.

The Michigan Court of Appeals issued an opinion on December 10, 1987 (App. B, B-1 - B-9) which held that changes had been made to the terms of the June 11, 1985 settlement and that Appellant had, based upon the facts, agreed to the terms of the judgment as changed (App. B, at B-5 - B-6). The Court of Appeals did so without taking any testimony whatsoever. This factual finding was based solely upon a review of the mediation transcript. This mediation transcript was never even admitted into evidence by the trial court.

In its opinion, the Michigan Court of Appeals also stated "We decide only that, insofar as the laws of this state are concerned, it is proper for the parties to attach conditions to

plaintiff's entitlement to periodic alimony." (App. B, at B-8 - B-9).

On January 4, 1988 Appellant filed an "Application For Leave To Appeal" with the Michigan Supreme Court (App. E, E-1 - E-13). In the Statement of Questions Presented in Appellant's Brief In Support of Application For Leave To Appeal to the Michigan Supreme Court (App. G, G-1 - G-2), Appellant specifically raised Question III: "Did the Court Of Appeals Clearly Err In Affirming The Deprivation Of A Party To A Divorce Proceeding's Rights Under The Bankruptcy Code of 1978 By A State Court Judge?" (App. G, at G-2). In that same Brief, Appellant claimed that she had a right to, and had been deprived of, an evidentiary hearing.

On June 28, 1938, the Michigan Supreme Court entered an Order Denying Appellant's Application For Leave To Appeal (App. A, A-1 - A-3).

SUBSTANTIALITY OF THE FEDERAL QUESTION

1. In Northern Pipeline Co. v Marathon Pipeline Co., 458 U.S. 50, 102 S. Ct. 2858, 6 C.B.C. 2d 785 (1982), this Court declared 28 U.S.C. Section 1471 unconstitutional. That case involved a matter of state law being brought before a non-Article III bankruptcy judge. The instant case involves the opposite situation. In this case, matters of the federal bankruptcy law are being decided by state courts.

28 U.S.C. Section 1334(b), enacted on July 10, 1984, grants the U.S. District Court original but not exclusive jurisdiction of proceedings under Title 11 or arising in cases under Title 11. The non-exclusive

jurisdiction of the U.S. District Court permits the state courts to have jurisdiction of proceedings arising under Title 11 or arising in cases under Title 11.

It is Appellant's position that state courts, in exercising jurisdiction over proceedings arising under Title 11 or arising in cases under Title 11, must apply the law of Title 11.

Congress has the power to establish uniform bankruptcy laws throughout the United States, according to Article 1, Section 8, Clause 4 of the United States Constitution. This power must be considered along with the power of Congress to make all laws which may be necessary and proper for carrying into execution its foregoing powers,

pursuant to Article 1, Section 8, Clause 18 of the United States Constitution. Wright v. Union Central L. Ins. Co., 304 U.S. 502, 82 L. Ed. 1490, 58 S. Ct. 1025 (1938), reh den 305 U.S. 668, 83 L. Ed. 433, 59 S. Ct. 56.

To allow state courts to make decisions in proceedings arising under Title 11 or arising in cases under Title 11, without consideration of the bankruptcy laws that Congress has enacted in Title 11, is clearly impermissible. "States may not pass or enforce laws to interfere with or compliment the Bankruptcy Act, or to provide additional or auxiliary regulations." International Shoe Co. v Pinkus, 278 U.S. 261, 265, 73 L. Ed. 318, 49 S. Ct. 108 (1928).

2. As part of the Judgment of Absolute Divorce entered on November 20, 1985, the state trial court entered the second sentence of Paragraph 10, which provides as follows:

"In the event the plaintiff shall declare voluntary bankruptcy so that her obligation hereunder shall be eliminated or diminished then, in said event, the defendant shall have a right to set-off against his obligation to pay alimony the amount of said deficiency that is attributable to the plaintiff." (App. C, at C-9) This clause provides for a means of payment of the indemnity obligation created in the first sentence of Paragraph 10 of the Judgment of Absolute Divorce (App. C,

at C-8 - C-9) in the event that Appellant files bankruptcy. This is a clear attempt to reinstate an obligation in the event that it is discharged by bankruptcy.

This obligation is not an obligation which is excepted from discharge under 11 U.S.C. Section 523. To allow this obligation to be not discharged, without being within the exceptions to discharge legislated by Congress in 11 U.S.C. Section 523, allows the state court to create a new class of non-dischargeable obligations. 11 U.S.C. Section 727(b) and 11 U.S.C. Section 1141(d) provide that obligations, other than those excepted from discharge by 11 U.S.C. Section 523, are discharged. The creation of a new class of non-dischargeable obligations by a

state court clearly violates the intent of Congress in 11 U.S.C. Section 727(b) and 11 U.S.C. Section 1141(d).

This Court in Ohio v Kovacs, 469 U.S. 274, 83 L. Ed. 2d 649, 105 S. Ct. 705 (1985), unanimously upheld the right of a debtor to receive a discharge, despite a state's intention to the contrary. In the instant case, the state court had other means to insure payment of the obligation. It had the power to grant a lien on Appellant's property, pursuant to the Judgment of Absolute Divorce, to require Appellant's payment of the obligation. It did not have to interfere with Appellant's discharge.

Moreover, no one has contended that Appellee will not be able to seek an alimony reduction, under state law, based upon the changed financial position of Appellee, if Appellant defaults on this obligation.

3. Even if an obligation is not discharged pursuant to 11 U.S.C. Section 523, Congress has prohibited that creditor from executing upon the debtor's exempt property except in certain circumstances. 11 U.S.C. 522(c).

The state court, through the second sentence of Paragraph 10 of the Judgment of Absolute Divorce, has created another type of debt which, if not discharged, may be collected from Appellant's exempt property, exempted pursuant to 11 U.S.C. Section

522(d)(10)(D). This clearly conflicts with the intent of Congress expressed in 11 U.S.C. Section 522(c).

The Michigan Court of Appeals held the clause in question valid because it found that Appellant had agreed to it (App. B, at B-8). Appellant has repeatedly contested, and continues to contest, that she agreed to this provision. However, Congress in 11 U.S.C. Section 522(e), a section which was raised before the Michigan Court of Appeals, has specifically decided the outcome in the event of such an agreement. That section makes a waiver of an exemption unenforceable.

The purpose of the Bankruptcy Act is to permit the debtor to have a fresh start free from her obligations. Williams v United States F. & G. Co.,

236 U.S. 549, 59 L. Ed. 713, 35 S. Ct. 289 (1914).

The purpose of the second sentence of Paragraph 10 of the Judgment of Absolute Divorce is to deny Appellant a fresh start from the obligation created in the first sentence of Paragraph 10 of the Judgment of Absolute Divorce.

Appellant relied upon the appellate Courts to reinstate the rights Congress has given her under federal bankruptcy law by filing a bankruptcy petition one month after the Judgment of Absolute Divorce was entered by the trial court. The Michigan Court of Appeals and the Michigan Supreme Court have failed to reinstate her rights.

4. "It is, of course, clear that on due process grounds, no judge can compel a settlement prior to trial on terms which one or both parties find completely unacceptable." In Re La Marre, 494 F. 2d 753, 756 (1974). The due process clause of the Fourteenth Amendment requires that parties whose rights will be affected are entitled to a hearing. Fuentes v Shevin, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983, 10 UCCRS 913 (1972), reh den 409 U.S. 902, 34 L. Ed. 2d 165, 93 S. Ct. 177. To compel a party to be bound to a settlement that she has not agreed to deprives her of her right to be heard on the issues involved in the case.

However, where there is a dispute concering the agreement of a party to an alleged settlement, that party also

has a right to be heard on the issue of whether she agreed to the alleged settlement. Denying her that right is a second deprivation of due process. The right to a hearing under the due process clause includes the right to introduce evidence. Baltimore & O.R. Co. v United States, 298 U.S. 349, 80 L. Ed. 1209, 56 S. Ct. 797 (1935). In the instant case, Appellant has been deprived of her right to a hearing and a right to present evidence that she did not agree to the terms of the judgment. The trial court made no findings of fact that the terms of the judgment had been agreed to by both parties.

The Michigan Court of Appeals did make findings of fact that Appellant agreed to the terms of the judgment. However, with the Court of Appeals

acting as the trial court, there was no state appellate court that Appellant could appeal to by right. An appeal cannot be granted to some litigants and arbritarily denied to others. Lindsey v Normet, 45 U.S. 56, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972).

More importantly, the Michigan Court of Appeals made findings of fact that Appellant agreed to the terms of the judgment solely upon a review of the mediation transcript. The Michigan Court of Appeals, as well as the trial court, deprived Appellant of her right to be heard and to present evidence that she did not agree to the terms of the judgment.

CONCLUSION

For the foregoing reasons, the Court should summarily reverse the decision below.

In the alternative, the Court should note probable jurisdiction of this appeal to set it down for plenary briefing and argument.

Respectfully submitted.

Theresa F. Mitan
Appellant, Pro Se.

September, 1988

FILED
SEP 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

Theresa F. Mitan, Appellant

v.

Frank J. Mitan

On Appeal From The Michigan Supreme Court

APPENDIX TO JURISDICTIONAL STATEMENT

Appellant, Pro Se:
Theresa F. Mitan
30943 Club House Lane
Farmington Hills, MI 48018

September, 1988

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APPENDIX A

Order Of The Michigan Supreme Court

APPENDIX B

Opinion Of The Michigan Court Of Appeals

APPENDIX C

Judgment Of Absolute Divorce

APPENDIX D

Order Denying Motion To
Reconsider Order Entering Judgment
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APPENDIX E

Application For Leave To Appeal To
The Michigan Supreme Court

APPENDIX F

Claim Of Appeal To The

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APPENDIX G

Statement Of Questions Presented

In Brief In Support Of

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To The Michigan Supreme Court

APPENDIX H

Statement Of Questions Involved

In Brief Of Appellant-Plaintiff

Theresa F. Mitan In The

Michigan Court Of Appeals

APPENDIX I

Motion To Reconsider Order Entering

Judgment Of Absolute Divorce And

To Amend Judgment Of Absolute

Divorce

APPENDIX J

Constitutional And Statutory Provisions Involved

Michigan Supreme Court

Lansing, Michigan

Dorothy Comstock Riley
Chief Justice

Charles L. Levin
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dennis W. Archer
Robert P. Griffin
Associate Justices

ORDER

Entered: June 28, 1988

82351

Theresa F. Mitan,

Plaintiff-Appellant,

v SC: 82351

COA: 90001

LC: 83-266365-DM

Frank J. Mitan,

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not pursuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

June 28, 1988 /s/ Corbin R. Davis

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

THERESA F. MITAN, Dec. 10, 1987

Plaintiff-Appellant,

-v-

FRANK J. MITAN, No. 90001

Defendant-Appellee.

_____/

BEFORE: R.J. Danhof, C.J., and J. H. Sheperd and W. A. Porter*,

PER CURIAM

Seeking relief from the property settlement, plaintiff appeals by right from the judgment of divorce and a subsequent order denying her motion for consideration. We affirm.

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* Circuit judge, sitting on the Court Of Appeals by assignment.

On June 11, 1985, the attorneys for the parties read a property settlement into the record at a hearing conducted by Oakland Circuit Court Judge T. John Lesinski, who was acting in lieu of Judge David F. Breck. Both parties then stated on the record that they agreed to the settlement and that they would be bound by it. The circuit court announced from the bench that a judgment of divorce incorporating the settlement would be entered, effective that day. However, no judgment was entered at that time.

On September 11, 1985, plaintiff

filed for entry of judgment, alleging that she had submitted a proposed property settlement agreement and judgment of divorce embodying the terms of the oral agreement. Defendant refused to sign, contending that the proposed judgment and property settlement were not in accordance with the terms of the oral agreement. Judge Breck entered an order appointing Judge Lesinski to mediate the "two or three issues to be decided."

At a mediation hearing on October 23, 1985, the parties both agreed at the outset to be bound by the mediator's decision.

The parties then negotiated certain modifications to the alimony and property settlement provisions. At

the conclusion of the mediation, it was agreed that the proposed judgment of divorce and incorporated property settlement would be drafted to reflect these modifications. The parties never did agree on a draft, but Judge Breck entered a judgment of divorce over plaintiff's objections.

Plaintiff argues that the property settlement incorporated by the court into the judgment of divorce did not reflect the terms of the parties' oral agreement on June 11, 1985. She further argues that the mediator exceeded his authority by altering the agreement.

An oral agreement to divide marital property is binding on the parties and enforceable by the courts on the basis of contractual

principles. Tinkle v Tinkle, 106 Mich App 423; 308 NW2d 241 (1981). In the instant case, the later modifications were effected pursuant to the mutual agreement of the parties. At the mediation hearing, the parties informally agreed to be bound by the results of the mediation. Moreover, our reading of the transcript leads us to conclude that each modification was in fact the product of the parties' bargaining and that no term was unilaterally imposed by the mediator. Since a property settlement may be modified by a voluntary agreement, Corrigan v Aetna Life & Casualty, 140 Mich App 467, 474-475: 364 NW2d 728 (1985), we conclude that the subsequent modifications were proper. We further conclude that the property settlement incorporated by the judgment of divorce accurately

reflected the parties' modified agreement.

Plaintiff next argues that the circuit court lacked the jurisdiction to enter a property settlement that required defendant to dismiss a cross-claim against plaintiff in a separate, pending action. In that action, a creditor sought to collect on a debt jointly owed by both parties. We find no merit cause of action belonging to one of the parties to a divorce action against a third party is a marital asset for purposes of the property settlement. Bywater v Bywater, 128 Mich App 396; 340 NW2d 102 (1983). We see no reason why the result should be any different when the cause of action is asserted by one party against the other party to the divorce. The property settlement did

no more than to reallocate an obligation owed by one party to the other.

Plaintiff finally contends the validity of a provision of the judgment allowing defendant to assert a setoff against his alimony obligation in the event of plaintiff's declaration of voluntary bankruptcy. The setoff would amount to plaintiff's share of the liability for a joint debt that would be discharged in the event of bankruptcy, resulting in a shifting of that share of the debt to defendant. It is plaintiff's contention that the provision permitting the setoff against alimony allows defendant to circumvent the Bankruptcy Act's provision exempting alimony payments from inclusion in the bankruptcy estate for the benefit of

the bankrupt's creditors. 11 USC 522(d)(10)(D).

We begin by noting the longstanding reluctance of the judiciary of our state to decide questions of federal bankruptcy law. Sheldon v Rounds, 40 Mich 425 (1879); Voorhies v Frisbie, 25 Mich 476 (1872). CF. Westerhof v Westerhof, 137 Mich App 97; 357 NW 2d 820 (1984). We note that the provision of the judgment in question was the product of the parties' negotiations culminating in a voluntary agreement. Therefore, there is no question of whether the court erred by imposing a condition outside the scope of its adjudicatory power. Kasper v Metropolitan Life Ins Co., 412 Mich 232; 313 NW2d 904 (1981); Tinkle, supra. We decide that, insofar as the laws of this state are

concerned, it is proper for the parties to attach conditions to plaintiff's entitlement to periodic alimony. Hall v Hall, 157 Mich App 239; 403 NW2d 530 (1987).

AFFIRMED: /s/ Robert J. Danhof

/s/ John H. Sheperd

/s/ William A. Porter

STATE OF MICHIGAN

IN THE CIRCUIT COURT

FOR THE COUNTY OF OAKLAND

THERESA F. MITAN,

Plaintiff,

vs No. 83-266365 DO

Hon. T. John Lesinski

FRANK J. MITAN,

Defendant. David F. Breck,

Circuit Judge

_____/

Kenneth S. Wilson (P31384)

Attorney for Plaintiff

Richard K. Uhl (P21665)

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358-4141

JUDGMENT OF ABSOLUTE DIVORCE

At a session of said Court held in the Courthouse in the City of Pontiac, Oakland County, Michigan this 11/20/85

PRESENT: Honorable T. John Lesinski, Circuit Judge

The parties of this case having entered into a Property Settlement Agreed dated June 11, 1985, and the Court having made certain findings in

fact and conclusions of law upon the record in open Court, the Court specifically having found that this Court has jurisdiction of the parties in the subject matter of this litigation and having further found that there has been a breakdown of the marriage relationship of the parties to the extent the objects of matrimony have been destroyed and there remains no reasonable likelihood the marriage can be preserved, and the Court having found that two children were born to the parties during their marriage, both of whom have reached the age of majority, and the Court being otherwise fully informed in the premises:

DIVORCE

1. IT IS ORDERED that the marriage

between the parties be dissolved and hereby is dissolved accordingly and a divorce from the bonds of matrimony between the parties is hereby adjudged and ordered.

ALIMONY

2. IT IS FURTHER ORDERED that defendant shall pay to plaintiff permanent alimony for her support and maintenance for the remainder of plaintiff's life or until plaintiff remarries or until defendant's death and until further order of the Court. Alimony for the first 12 months shall be $1,300.00 per month beginning June 11, 1985. Payment of the foregoing sum shall be made monthly. Payment of $1,300.00 shall be made on the 11th day of each and every month. After 12 months, this amount shall be reduced

to $1,000.00 per month as plaintiff's permanent alimony. This payment of permanent alimony shall be made on the 11th day of each and every month, $1,000.00 shall be due plaintiff from defendant at that time. Payment of the alimony referred to herein shall be made through the office of the Friend of the Court for the County of Oakland and defendant shall pay any and all service charges in connection therewith.

PROPERTY DISTRIBUTION

3. IT IS FURTHER ORDERED that the property of the parties be distributed, divided and awarded pursuant to the Property Settlement agreed to in this case which is hereby adopted by the Court and incorporated by reference.

INSURANCE

4. IT IS FURTHER ORDERED that any interest which either of the parties may have had or may now have in other insurance policies or contracts of the other party shall be and hereby are extinguished. The parties herein shall in the future hold all other insurance free and clear of any right or of any interest which the other may have had heretofore or may have therein or thereto by virtue of being the beneficiary, the contigent beneficiary, or otherwise.

DEBTS AND OBLIGATIONS

5. IT IS FURTHER ORDERED that plaintiff assume and pay all mortgage payments, including principal and

interest, taxes and assessments on the marital home located at 30943 Clubhouse Lane, and maintain during her possession and occupancy all utilities which may include but not be limited to heat, electicity, telephone, water and any other utility charges.

6. IT IS FURTHER ORDERED that plaintiff assume and agree to pay certain miscellaneous debts due on various credit cards incurred after the date of filing the Complaint for Separate Maintenance with the exception of Sears ($1,600.00), Comerica ($2,800.00), and M.C.I. ($600.00) which the defendant will pay and save the plaintiff harmless.

7. IT IS FURTHER ORDERED that defendant assumes and shall pay any

and all debts and obligations due to the State of Michigan as a result of any tax deficiencies or arrearages resulting from or in connection with the operation of Frizzell Cartage and Telway Truck Sales.

8. IT IS FURTHER ORDERED that defendant shall indemnify plaintiff for any and all liabilities she might receive in connection therewith.

9. IT IS FURTHER ORDERED that plaintiff assume and be responsible for any and all personal debts and obligations related to Midwest News Service. With respect to said debts and obligations, it is ordered that plaintiff indemnify defendant from any liability in connection therewith.

10. IT IS FURTHER ORDERED that any

and all liabilities incurred as a result of the $150,000.00 loan received from Comerica, secured by the property in Wixom, be split equally by the parties, each party agreeing to indemnify the other fo any liability incurred beyond his or her 50% share. In the event the plaintiff shall declare voluntary bankruptcy so that her obligation hereunder shall be eliminated or diminished then, in said event, the defendant shall have a right to set-off against his obligation to pay alimony the amount of said deficiency that is attributable to the plaintiff.

11. IT IS FURTHER ORDERED that Plaintiff and defendant agree that each of them shall be responsible for any and all attorney's fees and costs incurred by each of them during the

pendency of this action and that neither shall make a claim for attorneys' fees or costs from or of the other.

12. IT IS FURTHER ORDERED that husband and wife sign and file separate federal, state and local tax returns for the calendar year 1985.

DOWER

13. IT IS FURTHER ORDERED that the foregoing Property Settlement is being made for either party and that either party sahll hereafter hold their remaining lands free, clear and discharged from any such dower right or claim and that said provision shall also be in full satisfaction of all claims that either party may have in any property in which either party

owns or may hereafter own or which either party has or may hereafter have any interest in.

FRIEND OF THE COURT

14. IT IS FURTHER ORDERED that both parties hereto shall, so long as any provisions of this Judgment in respect to alimony are in full force and effect, notify the Oakland County Friend of the Court of any change of address.

EXECUTION OF DOCUMENTS

15. IT IS FURTHER ORDERED that the parties hereto shall execute those documents necessary to effectuate any transfer of property ordered in this Judgment and, in the event of failure of either party to execute such

documents, this Judgment may be recorded with the appropriate agency and stand as a full and complete conveyance of such property.

RETENTION OF JURISDICTION

16. IT IS FURTHER ORDERED that in addition to the general retention of jurisdiction as provided in the Court Rules and statutes provided, this Court shall and does specifically retain jurisdiction of this cause to enforce any and all of the provisions contained herein.

CIRCUIT JUDGE

Approved For Entry:

Kenneth S. Wilson (P31384)

Attorney for Plaintiff

STATE OF MICHIGAN

IN THE CIRCUIT COURT

FOR THE COUNTY OF OAKLAND

THERESA F. MITAN

Plaintiff, No.83-266365-DO

vs

FRANK J. MITAN Hon. T. John

Defendant Lesinski

_____/

Kenneth S. Wilson (P31384)

Attorney for Plaintiff

Richard K Uhl (P21665)

Attorney for Defendant

1588 American Center

27777 Franklin Road

Southfield, MI 48034

358-4141

_____/

PROPERTY SETTLEMENT

AGREEMENT

THIS AGREEMENT, made and entered into this 11th day of June, 1985, by and between Theresa F. Mitan (hereinafter referred to as ("wife") and Frank J. Mitan (hereinafter referred to as "Husband");

WHEREAS, the parties hereto were legally married on January 19, 1952, and lived and cohabited together as Husband and wife until January, 1985; and

WHEREAS, the parties are engated in litigation in the Circuit Court for the County of Oakland, State of Michigan, Case No. 83-266365-DO, and are not presently living together as

Husband and wife; and

WHEREAS, the wife seeks a Judgment of Absolute Divorce from Husband; and

WHEREAS, two (2) children were born of the parties as issue of their marriage, to-wit;

Keith Mitan, born September 20, 1955
Kenneth Mitan, born March 19, 1959

WHEREAS, the parties are desirious of definitely and for all times settling and determining all property and money rights between them, and all matters of dower, inheritance, alimony, maintenance, allowance for attorney fees, costs and expenses, which have arisen or which might arise out of the marriage relationship between the parties, and as a result

of any action for divorce; and

WHEREAS, the parties are fully informed and have been advised of their property rights and their rights in the estate of the other, and have been fully advised of their respective rights and liabilities against and to the other and to all the property and estates of the other of whatsoever like or kind; and

WHEREAS, throughout the ensuing negotiations leading to this Agreement, the parties have been represented by counsel;

NOW, THEREFORE, in consideration of their mutual promises, the parties hereto agree as follows:

PURPOSE OF AGREEMENT

1. This Agreement has been entered into by Husband and Wife for the purpose of defining their respective rights and obligations, assuming that this instrument will be offered in evidence as proof of the intentions of the parties in the case now pending in the Circuit Court for the County of Oakland, State of Michigan, and on the condition that the provisions are approved by the Court and incoporated in substance in the final Judgment of Divorce. In the event that the Court directs the entry of the final Judgment of Divorce, and does accept into evidence this Agreement, such Agreement shall not be merged into such Judgment, but shall survice and shall be forever binding and conclusive upon the parties, anything to the contrary notwithstanding.

Further, this Agreement shall be operative and in force upon execution thereof by the parties, and shall remain in effect until such time as the Court denies entry of the Judgment of Divorce, if the Court should do so.

PERMANENT ALIMONY

2. Husband shall pay the following sums to Wife as permanent alimony subject to (until) her death or remarriage or his death, though his death would not affect alimony obligations accrued at the time of death or until further order of the Court.

A. One thousand Three Hundred ($1,300.00) Dollars per month for a period of 12 months from and after the date of the entry of the Judgment.

After the payment of One Thousand Three Hundred ($1,300.00) Dollars per month for 12 months, Husband shall pay One Thousand ($1,000.00) Dollars to Wife per month as alimony. Payment of the foregoing sums shall be made monthly, payments due on the 11th of each month.

B. Payment of the alimony referred to herein shall be made through the office of the Friend Of the Court for the County of Oakland and Husband shall pay any and all service charges in connection therewith.

3. Wife shall pay no alimony to Husband and any right that he has or would have to receive alimony is hereby and forever barred.

DIVISION OF JOINT PROPERTY

S. Husband and Wife shall do the following acts and be bound with respect to the division of their joint assets and property as follows:

A. Husband and Wife shall jointly own the property known as the 5.7 acres of vacant land in Wixom, Michigan as tenants in common.

B. Wife shall become the sole and separate owner of the marital property and marital home located at 30943 Clubhouse Lane, Farmington Hills, Michigan. Beginning from the date of this Agreement, Wife shall and does hereby agree to assume and pay, along with any other obligations which may become due thereon, all mortgate payments, including principal and interest, taxes and assessments. In

addition, she shall be required to maintain during her possession and occupancy all utilities which may include but not be limited to heat, electricity, telephone, water and any other utility charges.

C. Wife shall become the sole and separate owner of the household furnishings, appliances and other appurtenances presently contained in and about the marital residence.

D. Wife shall become the sole and separate owner of the parties one-third (1/3) interest in the building and property located at 48600 West Twelve Mile Road, Wixom, Michigan; sometimes known as Mitan Properties. It is understood, however, that both the plaintiff and defendant do not relinquish any and

all claims they may have against Mitan Properties for various loans and advances and any other transactions between the plaintiff and defendant, collectively and individually, against Mitan Properties and/or its partners.

E. Wife shall become the sole and separate owner of lthe 1980 Cadillac Seville automobile and she shall assume and agree to pay and hold Husband harmless from any obligation in connection with said vehicle incurred after the date of entry of this Judgment.

F. Wife shall become the sole and separate owner of her fur coat and diamond ring.

G. Wife shall become the sole and separate owner of the property known

as the Lot in Colorado.

H. Wife shall become the sole and separate owner of any and all interest of the parties in Midwest News Corporation.

I. Subject to lthe Court Order of June 14, 1985, the parties agree to split the proceeds of any and all bank accounts evenly, each to receive 50%. This portion of the Agreement does not affect the Husband's saving account referred to in paragraph 4(L).

J. There are proceeds of approximately One Hundred Twenty Four Thousand ($124,000.00) Dollars payable to the Husband and Wife from proceeds from a land contract referred to as the Bsiley Land Contract. The parties having made several adjustments

regarding their respective obligations under the Judgment of Divorce and Property Settlement and after a mediation hearing held October 23, 1985, that the proceeds received from said contract be distributed as follows:

(a) Plaintiff Wife is to receive payments due under said contract in the amount of Two Thousand Six Hundred ($2,600.00) Dollars both in November and December. The final payment of said land contract is due in December of 1985 and of said final payment when made, the defendant Husband is to receive the sume of Seventy Eight Thousand Seven Hundred Seventy Two ($78,772.00) Dollars. The defendant Wife is to receive the sum of Forty Five Thousand Twenty Eight ($45,028.00) Dollars, being the

agreement of the parties that the defendant is receiving 63% of the final payment due under said land contract and the plaintiff wife 37%. If for some reason there is a default in said payment due in December of 1985, the interest received thereafter shall be distributed on the basis of 63% to the defendant husband and 37% to the plaintiff wife. Further, in the event that there is a default in said payment, the defendant husband has the option of purchasing for cash the interest of the plaintiff wife in the amount of Forty five thousand Twenty Eight ($45,028.00) Dollars Further, the plaintiff wife has the right to purchase the interest of the defendant Husband by payment of the sum of Seventy Eight thousand Seven Hundred Seventy two ($78,772.00) Dollars.

BEST AVAILABLE COPY

K. Husband shall become the sole owner of Frizzell Cartage and Leasing Company. Husband assumes and agrees to pay and hold Wife harmless from any obligation in connection with said Company.

L. Husband shall become the sole and separate owner of his savings account at Security Bank, which he represents is $7,500.00 or less.

M. Husband shall become the sole and separate owner of any and all IRA's in his name.

N. Husband shall become the sole and separate owner of the GMC Pick-Up Truck and he shall assume and agree to pay and hold Wife harmless from any obligation in connection with said

vehicle.

O. Husband and Wife each agree to split the following shares of stock equally:

Michigan National Corporation Common Stock 299 shares

Toledo Edison Company Common Stock 135 shares

Ohio Edison Common Stock 100 shares

Consumers Power Company Common Stock 100 shares

Portland General Electric Company Common Stock 200 shares

Duquene Light Company Common Stock 20 shares

P. Each party shall, at any time and from time to time hereafter, take any and all steps and execute, acknowledge and deliver to the other

party, any and all further instruments and assurances the other party may reasonably require for the purpose of giving full force and effect to the provisions of this Agreement according to its spirit and intent.

Q. Except as hereinbefore provided, each of the parties shall hereafter own, have and enjoy all items of real and personal property (tangible or intangible) now or hereafter in his or her possession or in his or her name with full power to him or her to dispose of the same as fully and effectively in all respects and for all purposes.

R. It is further agreed that the above mentioned paragraph applies to any and all fixtures formerly possessed by or used by Frizzell

Cartage that are now on or near property owned by Mitan Properties, said fixtures to be held by Plaintiff.

S. It is agreed by and between the parties that the terms and conditions of the property settlement specifically specified in this section shall be in lieu of any and all dower rights which either party may have in property owned or hereafter acquired by the other.

LIABILITIES

5. Wife does hereby assume and agree to pay any and all personal obligations or debts incurred by her after the filing of the Complaint for Separate Maintenance in this matter. Wife further assumes and agrees to pay any and all personal obligations

incurred as a result of operating Midwest News Service. With respect to said debts and obligations, each agrees to indemnify and agrees to hold each other harmless from any liability in connection therewith. Husband may set-off any and all amounts paid after the two weeks notice previous to payment to plaintiff to satisfy debts which, under this Judgment of Divorce and Property Settlement are stated to be Wife's, from alimony upon two (2) weeks notice to plaintiff's counsel. Defendant will not pay any such debts unless legally obligated to do so. Any and all such disputes in this regard shall be resolved by the Friend of the Court whose decision as to the issues indicated in this section shall be binding.

6. Husband does, with the exception

of the joint debt with plaintiff with Comerica, hereby asumes and agrees to pay any and all obligtions to the State of Michigan or the United States Government or any other creditors, private or public, resulting from or relating to the failure to pay taxes or any tax liabilities or any other kind of obligation in any way related to or incurred in the operation of Frizzell Cartage, Frizzell Cartage and Leasing, and Telway Truck Sales. With respect to said debts and obligations, Husband does hereby indemnify and agree to hold Wife harmless from any liability in connection therewith.

7. Husband and Wife agree that any liability incurred as a result of the $150,000.00 loan received from Comerica, secured by the property in Wixmom, be split by the parties, each

agreeing to indemnify the other for any liability incurred beyond his or her share. Any and all cross-claims between the parties in regard to any and all suits maintained by Comerica are hereby dismissed.

8. Except as herein set forth, neither party shall be responsible for any debt or obligation incurred by the other after the date of this Agreement, nor any debt incurred by the other in his or her name prior to the date of this Agreement which has not been disclosed to the other and each party shall be responsible for and pay any debts incurred by them separately since the filing of Wife's Complaint for Separate Maintenance which have not been disclosed during the course of these proceedings and each does indemnify and hold the

other harmless against any liability thereon.

INCOME TAX RETURNS AND TAX MATTERS

9. Husband and Wife agree to file separate federal, State of Michigan and local tax returns for the calendar year 1985.

ATTORNEYS' FEES

10. Husband and Wife agree that each of them shall be responsible for any and all attorneys' fees and costs incurred by each of them during the pendency of this action and that neither shall make a claim for attorneys' fees or costs from or of the other.

BEST AVAILABLE COPY

INSURANCE

11. Husband and Wife agree that all policies of life insurance, owned by or on the life of either party, shall being to and be the sole property of the owner thereof who shall have the sole obligation to pay all premiums and make any disposition thereof or designate any beneficiary he or she may desire hereafter.

ARREARAGES

12. Husband and Wife agree that, after adjustments have been made in accordance with the mediation hearing of October 23, 1985, there are no arrearages for any past or present alimony payments and, further, that the alimony to be paid plaintiff by defendant Husband by the terms of this

Agreement will be paid out of the November and December payments from the Bailey Land Contract; said payments being in the amount of Two Thousand Six Hundred ($2,600.00) Dollars and One Thousand Three Hundred ($1,300.00) Dollars of said amount will apply towards the obligation of alimony for the months of November and December. The January payment will be made through the Friend of the Court.

13. Husband and Wife agree that Husband will continue to pay any and all expenses required of him pursuant to any temporary orders of the Court referred to above until the date of this Agreement shall become effective or be operative, anything to the contrary notwithstanding.

IMPLEMENTATION OF AGREEMENT

14. Husband and Wife hereto further agree that each party shall, at any time hereafter, take any and all steps and execute, acknowledge and deliver to the other party any and all further instruments and assurances that the other party may reasonably require for the purpose of giving full force and effect to the provisions of this Agreement and the Judgment of Divorce.

RESIDENCE AND GOVERNING LAW

15. Husband and Wife acknowledge that both are bona fide residents of and domiciled in the State of Michigan and this Agreement shall be governed by the laws of the State of Michigan.

MODIFICATION, WAIVER OR BREACH

16. Husband and Wife agree that no modification or waiver of any of the terms hereof shall be valid unless in writing and signed by both parties. No waiver of any breach hereof or any default hereunder shall be deemed a waiver of any subsequent breach or default of the same or similar nature.

ENTIRE AGREEMENT

17. Husband and Wife agree that this Agreement constitutes the entire understanding of the parties. It supersedes any and all prior agreements between them. There are no representations or warranties, other than those expressly herein set forth.

IN THE EVENT OF DIVORCE

18. Husband and Wife agree that

this Agreement shall be offered in evidence in the pending action for divorce and, if acceptable to the Court, shall be incorporated by reference in the Judgment that may be granted therein. Notwithstanding such incorporation, this Agreement shall not be merged in the Judgment but shall survive the same and shall be binding and conclusive on the parties for all time.

INDEPENDENT ADVICE OF COUNSEL

19. Husband and Wife respectively acknowledge that each has obtained independent advice of counsel of his or her own selection; that each fully understands the facts and has been fully informed of their respective rights and obligations; and that having had such advice, each of them

is signing this Agreement freely and voluntarily.

LIEN FOR ATTORNEYS' FEES

20. Husband and Wife agree, and Wife does hereby consent to, the imposition of an attorneys' lien in favor of Wife's attorney, Hardig, Goetz, Heath, Merritt & Reebel, for attorneys' fees to be determined between Wife and Hardig, Goetz, Heath, Merritt & Reebel; the same to be paid from Wife's share of any and all bank accounts held jointly by the parties prior to the date of divorce and any and all proceeds due Wife from the Bailey Land Contract. A legal description of the property, subject to the Bailey Land Contract, is attached as Rider A.

21. Husband and Wife agree, and Wife does hereby consent to, the imposition of an attorneys' lien in favor of Wife's attorneys, Hardig, Goetz, Heath, Merritt & Reebel, on all assets awarded to Wife, including but not limited to the property known as 30943 Clubhouse Lane, Farmington Hills, whose legal description is attached as Rider B.

22. Husband and Wife agree and each does hereby consent that the proceeds from the Bailey Land Contract, due after the monthly payment which consists of the so-called "balloon" payment, shall be made payable to both of them jointly and the Court hereby directs that the said balloon payment will be forwarded to defendant's attorney, Richard K. Uhl. There will be a disbursement of said funds in

accordance with the Property Settlement, upon concurrence of the plaintiff's attorney, Hardig, Goetz, Heath, Merritt & Reebel.

SIGNATURE IN COUNTERPART

24. This Agreement may be executed in counterpart by each of the parties with the resulting effect that this Agreement shall be binding as between them as though they had executed the Agreement on the same day and date, before the same witnesses.

_____

Theresa F. Mitan

/s/Frank J. Mitan

Frank J. Mitan

Witness:

/s/Richard K. Uhl

Richard K. Uhl

Dated : October 28, 1985

STATE OF MICHIGAN

OAKLAND COUNTY CIRCUIT COURT

THERESA F. MITAN,

Plaintiff,

-vs- No. 83-266365 DO

FRANK J. MITAN,

Defendant.

---/

Joseph L. Hardig, Jr. P 14634

Attorney for Plaintiff

Richard K. Uhl P 21665

Attorney for Defendant

---/

ORDER DENYING MOTION TO
RECONSIDER ORDER ENTERING
JUDGMENT OF ABSOLUTE DIVORCE
AND TO AMEND JUDGMENT OF
ABSOLUTE DIVORCE

At a session of said Court held in the Court House Towers, Pontiac, Michigan on January 8, 1986

PRESENT: HONORABLE /s/David F. Breck
CIRCUIT JUDGE

Plaintiff's Motion To Reconsider Order Entering Judgment of Absolute Divorce and to Amend Judgment Of Absolute Divorce having come on to be heard Wednesday, December 18, 1985, and the Court having being fully informed in the premises,

IT IS ORDERED That Plaintiff's

Motion To Reconsider Order Entering Judgment Of Absolute Divorce and to Amend Judgment Of Absolute Divorce be denied.

/s/David F. Breck

CIRCUIT JUDGE

Approved As To Form:

/s/Joseph L. Hardig, Jr.

JOSEPH L. HARDIG, JR.

/s/Richard K. Uhl

RICHARD K. UHL

STATE OF MICHIGAN

IN THE SUPREME COURT

THERESA F. MITAN,

Plaintiff-Appellant,

Supreme Court

No. 82351

-vs-

FRANK J. MITAN, Court of Appeals

No. 90001

Defendant-Appellee.

Oakland County

Circuit Court No.

83-266365 DM

_____/

Theresa F. Mitan

Plaintiff-Appellant

(IN PRO PER)

30943 Club House Lane

Farmington Hills, MI 48018

(313) 851-9531

Harvey Altus P30846

Attorney for Appellee

_____/

APPLICATION FOR LEAVE

TO APPEAL

NOW COMES, Plaintiff-Appellant, Theresa F. Mitan and requests that this Court grant her Application For Leave To Appeal from a decision of the Court of Appeals dated December 10, 1987 in the above captioned case, and in support of her application says:

1. Plaintiff-Appellant filed this divorce action on October 7, 1983.

2. On June 11, 1985, the parties placed a settlement agreement on the record before Judge T. John Lesinski, who was acting in lieu of Judge David F. Breck, in Oakland County Circuit Court. Testimony was taken and the court approved the settlement. (Exhibit A attached hereto).

3. On September 11, 1985, Plaintiff-Appellant submitted a proposed Judgement of Absolute Divorce and moved for its entry.

4. Defendant-Appellee objected to the entry of Plaintiff-Appellant's proposed Judgment on the basis that there were two or three issues yet to be decided.

5. At the hearing on entry of judgment on September 18, 1985, the

parties stipulated to submitting the remaining issues to binding mediation. Attached is a copy of the "Order Placing Cause Into Mediation" (Exhibit B) which notes: "to resolve the remaining issues". (Emphasis added)

6. The court order for mediation, then, was to mediate only issues other than those already agreed upon in the June 11, 1985 settlement placed on the record and approved by the court.

7. That at the outset of the mediation hearing the parties agreed only to be bound by the court's order of September 18, 1985, not to be bound by any changes to the June 11, 1985 settlement or decisions by the mediator which were not separately agreed to and not approved by the court.

The Court of Appeals opinion erronously assumes that that the parties agreed beyond that stated above.

8. That contrary to the Court's order of September 18, 1985, the mediator made changes in the June 11, 1985 settlement which changes were not separately agreed to by Plaintiff-Appellant. In fact, the Court of Appeals, in its opinion, finds that changes were made to the June 11, 1985 settlement during the mediation hearing.

9. That after mediation, Defendant-Appellee submitted a proposed Judgment of Absolute Divorce, and Plaintiff-Appellant filed objections to its entry. A hearing

was held on November 20, 1985, at which time Judge Breck did not review the mediation transcripts or findings, did not take any testimony, and did not make any findings that the Judgment, as changed from the June 11, 1985 settlement was fair and equitable, contrary to specific case law requiring these findings to be made by the trial court before entering the Judgment. Jones v Jones, 132 Mich App 497 (1984).

Judgment was entered by Judge Breck on November 20, 1985 (Exhibit C attached hereto).

10. On December 18, 1985, Plaintiff-Appellant brought a "Motion To Reconsider Order Entering Judgment Of Absolute Divorce and To Amend Judgment Of Absolute Divorce" before

the court. On that date, the trial court denied this motion (Exhibit D attached hereto) again without reviewing the mediation transcript or findings, without taking any testimony, and without making any finding that the Judgment of Absolute Divorce, as entered, was fair and equitable.

11. That on January 8, 1986, Plaintiff-Appellant filed an appeal with the Michigan Court of Appeals.

12. By opinion dated December 10, 1987, the Court of Appeals affirmed the Circuit Court (Exhibit E attached hereto).

13. The Court of Appeals opinion was clearly erronous. The Court of Appeals improperly based its decision

on an incorrect factual premise. As stated above, the parties agreed only to be bound by the mediator's findings on the remaining issues. At the outset of the mediation hearing the parties agreed only to be bound by the court's order of September 18, 1985, not to be bound by any changes to the June 11, 1985 settlement or decisions by the mediator which were not separately agreed to and not approved by the court.

14. The Court of Appeals decision was erronous because the trial court did not follow the law since, before entering judgment, it did not make findings that the settlement, as changed, was fair and equitable. This is contrary to specific case law requiring these findings to be made by the trial court before entering

judgment. Jones v Jones, supra.

15. The Court of Appeals findings that the parties agreed to modifications was erronous. The Court of Appeals did not even have the right to review the mediation transcript without first having a decision made by the trial court that the changes made to the June 11, 1985 property settlement by the mediator were fair and equitable.

16. Since the trial court did not follow the law, the Court of Appeals did not even have a proper finding to review on appeal.

17. That the proper approach is to have the case reversed and remanded to the trial court for testimony and evidence to be presented on the

mediator's findings in order to have Circuit Court approve or disprove under Jones v Jones, supra. At that time, Plaintiff-Appellant would finally be given an opportunity to present her evidence.

18. That the Judgment of Absolute Divorce contain a provision that violates the U.S. Bankruptcy Code on two separate counts. The affirmation of the validity of this clause by the Court of Appeals was clearly erronous.

The Court of Appeals ruling that this provision is allowable under state law if the parties agreed to it is based upon an expansion in the court's powers in the case of an agreement between the parties. However, any expansion of the court's powers cannot be to the extent that

the state court may violate federal law.

Additionally, even if the state court has power to violate federal law if an agreement exists, such an agreement cannot exist in this case. Federal law specifically makes such an agreement void. Since alimony is concerned, state law also makes such an agreement void. Bowman v Coleman, 356 Mich 390 (1957).

19. That this Application should be accepted since the Court of Appeals decision was clearly erronous. Moreover, the decision presents issues of major significance, particularly in allowing the violation of federal law. On that issue, the Court of Appeals decision is contrary to existing federal and state law.

Further, Plaintiff-Appellant will suffer irreputable prejudice since she is forced to abide by the terms of a Judgment which (a) was contrary to the June 11, 11985 settlement placed on the record and approved by the court, (b) was not agreed to by Plaintiff-Appellant, (c) and also was not even passed upon as fair and equitable by the trial court as required by existing state law.

WHEREFORE, Plaintiff-Appellant respectfully requests that this Honorable Court grant her Application For Leave To Appeal and reverse the decision of the Court of Appeals.

Respectfully submitted,

/s/Theresa F. Mitan

Theresa F. Mitan

30943 Club House Lane

Farmington Hills, MI 48018

(313) 851-9531

Dated: January 4, 1988

STATE OF MICHIGAN

IN THE COURT OF APPEALS

THERESA F. MITAN,

Appellant, Docket No. ____

-vs-

Oakland County Circuit

Case No. 83-266365 DM

FRANK J. MITAN,

Appellee.

CIRCUIT JUDGE DAVID BRECK

---/

Joseph L. Hardig, Jr. P14634

Attorney for Appellant

Richard K. Uhl P21665

Attorney for Appellee

---/

CLAIM OF APPEAL

Theresa F. Mitan, Appellant, claims an appeal from "Judgement Of Absolute Divorce" entered November 20, 1985 (attached) and from "Order Denying Motion To Reconsider Order Entering Jugdment Of Absolute Divorce And To Amend Judgment Of Absolute Divorce" entered January 8, 1986 in Oakland County Circuit Court by Honorable David Breck, (attached)

Hardig Goetz Heath Merritt & Reebel
Attorneys for Appellant
By /s/Joseph L. Hardig, Jr.
Joseph L. Hardig, Jr.
950 North Hunter Boulevard
Post Office Box 1167
Birmingham, Michigan 48012
Telephone 645-1100

Dated January 8, 1986

STATEMENT OF QUESTIONS PRESENTED

Question I

DID THE COURT OF APPEALS CLEARLY ERR IN AFFIRMING THE TRIAL COURT'S ENTRY OF A JUDGMENT OF ABSOLUTE DIVORCE PRIOR TO TRIAL BASED ON A DISPUTED AGREEMENT WITHOUT RECEIVING ANY EVIDENCE?

Appellant states "Yes"

Appellee states "No"

Lower Court states "No"

Question II

DID THE COURT OF APPEALS CLEARLY ERR BY FINDING THAT APPELLANT SUBSTANTIVELY AGREED TO THE TERMS OF THE JUDGMENT OF ABSOLUTE DIVORCE ENTERED BY THE TRIAL COURT?

Appellant states "Yes"

Appellee states "No"

Lower Court states "No"

Question III

DID THE COURT OF APPEALS CLEARLY ERR IN AFFIRMING THE DEPRIVATION OF A PARTY TO A DIVORCE PROCEEDING'S RIGHTS UNDER THE BANKRUPTCY CODE OF 1978 BY A STATE COURT JUDGE?

Appellant states "Yes"

Appellee states "No"

Lower Court states "No"

QUESTIONS INVOLVED

Question I

IS A WRITTEN PROPERTY SETTLEMENT WHICH HAS NOT BEEN AGREED TO BY ONE PARTY TO A DIVORCE BINDING AS PART OF THE JUDGMENT OF DIVORCE?

Appellant contends "No"

Appellee contends "Yes"

Trial Court answered "Yes"

Question II

IS AN AGREEMENT PLACED ON THE RECORD BINDING ON BOTH PARTIES?

Appellant contends "Yes"

Appellee contends "No"

Trial Court answered "No"

Question III

DOES A TRIAL COURT RENDERING A DIVORCE JUDGMENT HAVE JURISDICTION TO ORDER ONE PARTY TO THE DIVORCE ACTION TO DISMISS HER CROSS-CLAIM IN A DIFFERENT PENDING ACTION ASSIGNED TO A DIFFERENT JUDGE?

Appellant contends "No"

Appellee contends "Yes"

Trial Court answered "Yes"

Question IV

MAY A STATE COURT JUDGE IN A DIVORCE PROCEEDING DEPRIVE A PARTY OF HER RIGHTS UNDER THE BANKRUPTCY CODE OF 1978?

Appellant contends "No"

Appellee contends "Yes"

Trial Court answered "Yes"

STATE OF MICHIGAN

OAKLAND COUNTY CIRCUIT COURT

THERESA F. MITAN,

Plaintiff, No. 83-266365 DO

-vs-

FRANK J. MITAN,

Defendant.

_____/

Joseph L. Hardig, Jr. P14634

Attorney for Plaintiff

Richard K. Uhl P21665

Attorney for Defendant

_____/

MOTION TO RECONSIDER ORDER

ENTERING JUDGMENT OF ABSOLUTE

DIVORCE AND TO AMEND

JUDGMENT OF ABSOLUTE DIVORCE

Now comes Theresa F. Mitan, Plaintiff, by her attorneys, Hardig Goetz Heath Merritt & Reebel, and prays that this Court reconsider its order entering Judgment Of Absolute Divorce on November 20, 1985 and to amend Judgment Of Absolute Divorce, for the following reasons:

1. Paragraph 4-O, Property Settlement Agreement, does not list 20 shares of Detroit Edison.

2. Paragraph 4-O, Property Settlement Agreement, lists 20 shares of Duquesne Light rather than 100 shares of Duquesne Light.

3. Paragraph 4, Property Settlement

Agreement, should award the two Hampton bonds to Theresa Mitan (she has already received these two Bonds).

4. Paragraph 4, Property Settlement Agreement, the U.S. Steel Debenture should be awarded to Theresa Mitan (she has already received this Debenture).

5. Paragraph 6, Judgment Of Absolute Divorce, must order Frank Mitan to pay $700 to Mark Accutera's law firm.

6. Judgment Of Absolute Divorce and Property Settlement Agreement. Theresa Mitan is not to be responsible for debts if they resulted from items that were supposed to be furnished under the temporary court's order of support.

7. Paragraph 4-J, Property Settlement Agreement, does not grant wife a security interest in the Bailey land contract payments. Mrs. Mitan was originally protected in this regard by Judge Lesinski and should be protected now.

8. Paragraph 7, Property Settlement Agreement. This paragraph requires Theresa Mitan to dismiss her cross claim against Frank Mitan in the Comerica suit. Judge Lesinski had no power to make such an award, that suit not being under the jurisdiction of this Court. That sentence requiring cross claims to be dismissed should be deleted from Judgment of Absolute Divorce.

9. Judgment Of Absolute Divorce and Property Settlement Agreement,

responsibility for debts. Inasmuch as Theresa Mitan is ordered to be liable on personal obligations to Comerica because of a Tel-Way debt, (she had no interest in Tel-Way), it is only fair and reasonable that Frank Mitan be liable on personal obligations to Midwest News Service creditors with Theresa Mitan.

10. Paragraph 7, Property Settlement Agreement. Theresa Mitan has no defense to the Comerica suit against Frank and Theresa Mitan. Frank Mitan has the sole defense. It should be his responsibility to defend the suit, not Theresa Mitan's. She should not have to defend and incur additional legal fees.

11. Paragraph 12-Property Settlement Agreement. Frank Mitan must be

responsible to pay any arrearages and alimony.

12. Paragraph 4D, Property Settlement Agreement. It is unfair to permit Frank Mitan to assert a claim against Mitan Properties when Theresa Mitan cannot assert a cross claim against Frank Mitan in the Comerica suit. This paragraph should be amended to delete his ability to make any claim whatsoever against Mitan Properties.

13. Paragraph 9, Judgment Of Absolute Divorce. Plaintiff should only be responsible for debts related to Midwest News Service, Inc. since the date of her filing the Complaint For Separate Maintenance, not debts incurred prior to that date.

14. Paragraph 2, Judgment Of Absolute

Divorce and Paragraph 2A-Property Settlement Agreement. Alimony should be required to be paid on the first day of each month.

15. Paragraph 10, Judgment Of Absolute Divorce and Paragraph 7, Property Settlement Agreement. These paragraphs deprive Theresa Mitan of her statutory rights under the Bankruptcy Act. In effect, if she declares voluntary bankruptcy and Frank Mitan pays the Comerica debt, he can deduct her share of the liability from future alimony payments. This does not conform to Judge Lesinski's ruling, is void as it contradicts the Bankruptcy Act and is patently unfair.

16. Frank Mitan fraudutently failed to disclose a 1982 Buick Riviera owned by Frizzell Cartage Co. purchased

September 5, 1984 for $7,200. Theresa Mitan should be awarded an additional $3,600 as her share of this asset owned by Frank Mitan's solely-owned Frizzell Cartage Co.

17. The parties were entitled to a long term capital loss carry over of $225,835. Inasmuch as Theresa Mitan is compelled to share in the Comerica liability, which was for the benefit of Tel-Way, she should also share equally in the Tel-Way benefits. She should be entitled to 1/2 of the long term capital loss carryover. Any benefit Frank Mitan enjoys as a result of that tax loss carryover in future years should be reported to Theresa Mitan and she should have 1/2 of that benefit as determined by an independent tax expert.

WHEREFORE, Theresa Mitan pray that the Court reconsider its Order Entering Judgment of Absolute Divorce by either setting aside Judgment Of Absolute Divorce or, in the alternative, amending it as set forth above.

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Dated December 5, 1985

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privleges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Resprestatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such

male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legilation, the provisions of this article.

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11 United States Code Section 522(c)

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under Section 502 of this title as if such debt had arisen, before the commencement of the case, except-

(1) a debt of a kind specified in section 523(a)(1) or 523(a)(5) of this title, or

(2) a debt secured by a lien that is-

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is

properly filed.

11 United States Code Section 522(d)(10)(D)

(d) The following property may be exempted under subsection (b)(1) of this section:

(10) The debtor's right to receive-

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of debtor and any dependant of the debtor;

11 United States Code Section 522(e)

(e) A waiver of an exemption executed in favor of a creditor that holds an unsecured claim against the debtor is unenforceable in a case

under this title with respect to such claim against property that the debtor may exempt under subsection (b) of this section. A waiver by the debtor of a power under subsection (f) or (h) of this section to avoid a transfer, under subsection (g) or (i) of this section to exempt property, or under subsection (i) of this section to recover property or to preserve a transfer, is unenforceable in a case under this title.

11 United States Code Section 523

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt-

(1) for a tax or customs duty

(A) of the kind and for the periods

specified in section 507(a)(2) or 507(a)(6) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required-

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

2. for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by-

(A) false pretenses, a false representation, or actual fraud, other

than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing-

(i) that is materially false;

(ii) respecting the debtor's or an insiders's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $500 for "luxury goods or services" incurred by an individual debtor on or within forty days before the order for relief under this title, or cash advances aggregating more than

$1000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within twenty days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act (15 U.S.C. 1601 et seq.);

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is

owed, in time to permit-

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debtor is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while

acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or other order of a court of record or property settlement agreement, but not to the extent that-

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty-

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a

transaction or event that occurred before three years before the date of the filing of the petition;

(8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution, unless-

(A) such loan first became due before five years (exclusive of any applicable suspension of the repayments period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

(9) to any entity, to the extent that such debt arises from a judgment or consent decree entered in a court of record against the debtor wherein liability was incurred by such debtor as a result of the debtor's operation of a motor vehicle while legally intoxicated under the laws or regulations of any jurisdiction within the United States or its territories wherein such motor vehicle was operated and within which such liability was incurred; or

(9) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section

14c(1), (2), (3), (4), (6), or (7) of such Act.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965 (20 U.S.C. 1087-3), or under section 733(g) of the Public Health Services Act (42 U.S.C. 294f) in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debtor is not dischargeable in the case under this title.

(c) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if

the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

11 United States Code Section 727(b)

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order of relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such a claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed

under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

11 United States Code Section 1141(d)

(d) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan-

A. discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not-

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge a debtor if-

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

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(C) the debtor would be denied discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

28 United States Code Section 157(b)(2)(B)

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under

judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to-

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury against the estate for purposes of distribution in a case under title 11;

28 United States Code Section 157(b)(2)(I)

judgment, subject to review under section 139 of this title.

(2) Core proceedings include, but are not limited to—

(A) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of this title but not the liquidation or estimation of contingent or unliquidated personal injury against the estate for purposes of distribution in a case under title 11;

28 United States Code Section 157(b)(2)

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to-

(I) determinations as to the dischargeability of particular debts;

28 United States Code Section 1334(b)

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts

other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.